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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/775,896	02/10/2004	David M. Allen	2646-000003	1397
27572	7590	12/22/2006	EXAMINER	
HARNESS, DICKEY & PIERCE, P.L.C. P.O. BOX 828 BLOOMFIELD HILLS, MI 48303			GELLNER, JEFFREY L	
		ART UNIT	PAPER NUMBER	
		3643		
SHORTENED STATUTORY PERIOD OF RESPONSE		MAIL DATE	DELIVERY MODE	
3 MONTHS		12/22/2006	PAPER	

Please find below and/or attached an Office communication concerning this application or proceeding.

If NO period for reply is specified above, the maximum statutory period will apply and will expire 6 MONTHS from the mailing date of this communication.

<b>Office Action Summary</b>	Application No.	Applicant(s)
	10/775,896	ALLEN, DAVID M.
	Examiner Jeffrey L. Gellner	Art Unit 3643

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

#### Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

#### Status

- 1) Responsive to communication(s) filed on 05 October 2006.
- 2a) This action is FINAL.                    2b) This action is non-final.
- 3) Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

#### Disposition of Claims

- 4) Claim(s) 22-26 is/are pending in the application.
  - 4a) Of the above claim(s) 34 is/are withdrawn from consideration.
- 5) Claim(s) \_\_\_\_\_ is/are allowed.
- 6) Claim(s) 22-33, 35, 36 is/are rejected.
- 7) Claim(s) \_\_\_\_\_ is/are objected to.
- 8) Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

#### Application Papers

- 9) The specification is objected to by the Examiner.
- 10) The drawing(s) filed on \_\_\_\_\_ is/are: a) accepted or b) objected to by the Examiner.
 

Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).

Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

#### Priority under 35 U.S.C. § 119

- 12) Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
  - a) All    b) Some \* c) None of:
    1. Certified copies of the priority documents have been received.
    2. Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
    3. Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

#### Attachment(s)

- |  |   |
|--|---|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892)          | 4) <input type="checkbox"/> Interview Summary (PTO-413)           |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | Paper No(s)/Mail Date. _____                                      |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08)          | 5) <input type="checkbox"/> Notice of Informal Patent Application |
| Paper No(s)/Mail Date _____  | 6) <input type="checkbox"/> Other: _____                          |

### **DETAILED ACTION**

A further search of the prior art disclosed a self-closing tree guard. New art is applied to the claims. Examiner regrets any inconvenience to Applicant.

#### ***Election/Restrictions***

In the reply filed on 2 June 2005 Applicant elected the slit being parallel. Claim 34, therefore, is withdrawn because it is drawn to the non-elected species.

#### ***Claim Objections***

Claim 22 is objected to because of the following informality:

In claim 22, “the wall member” of line 8 should probably be --body-- to conform with the language of line 4 since in line 4 the “wall member” is includes a “body,” “upper flange,” and “lower flange.”

Appropriate correction is required.

#### ***Claim Rejections - 35 USC § 103***

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claims 22-26, 28, 29, 32, 33, 35, and 36 are rejected under 35 U.S.C. 103(a) as being unpatentable over Heschung (FR 2356361 A) in view of Friesner et al. (WO 93/03603).

As to claims 22, 35, and 36, Heschung discloses a mulch shield for a trunk (see Fig. 1) comprising a shield structure having a flexible member (generally 1 of Fig. 1; 4, 5, 6, of Fig. 2) for coiling around the trunk of a plant, with a body (5 of Fig. 2), upper flange (6 of Fig. 2), and lower flange (4 of Fig. 2); the flanges being coupled to the body (Figs. 1 and 2) and extending therefrom in a radially outward direction (see Figs. 1 and 2); a slit (2 of Fig. 1) formed in the body and flanges that permits a C shape and to be placed about a trunk; and, cleats (12 of Fig. 2) formed on the surface of the lower flange (in that the cleats come out of the lower surface). Not disclosed is the wall member being self-closing. Friesner et al., however, discloses a self-closing shield for a trunk (page 2, lines 35-38). It would have been obvious to one of ordinary skill in the art at the time of the invention to modify the shield of Heschung by making the shield self-closing as disclosed by Friesner et al. so as to have a convenient and easy closing means. The shield of Heschung as modified by Friesner et al. inherently disclose the method steps recited in claim 35 when it is used.

As to claim 23, the limitations of claim 2 are disclosed as described above. Not disclosed are the flanges having a bias toward the second condition. It would have been obvious to one of ordinary skill in the art at the time of the invention to further modify the shield of Heschung by making the complete shield self-closing as disclosed by Friesner et al. so as to have a convenient and easy closing means.

As to claims 24 and 25, Heschung as modified by Friesner et al. further disclose in the second condition a first portion of the shield over lapping a second portion (Heschung at Fig. 4) with a fastener, tape (Heschung at 13 of Fig. 4). (Friesner et al. also shows overlapping at Figs. 4-6 and page 7, lines 7-23.)

As to claim 26, the limitations of claim 24 are disclosed as described above. Not disclosed are first and second holes with a fastener disposed through the two holes. Friesner et al., however, discloses first and second holes with a fastener disposed through the two holes (from Friesner et al. at page 6, lines 31-33). It would have been obvious to one of ordinary skill in the art at the time of the invention to further modify the shield of Heschung as modified by Friesner et al. by using a tie fastening means as disclosed by Friesner et al. so as to have a convenient and easy closing means.

As to claims 28 and 29, the limitations of claim 22 are disclosed as described above. Not disclosed is the upper flange spaced from the lower flange by a predetermined distance associated with a desired mulch thickness , from 3 to 5 inches. It would have been obvious to one of ordinary skill in the art at the time of the invention to further modify the shield of Heschung as modified by Friesner et al. by having the upper flange spaced from the lower flange by a predetermined distance associated with a desired mulch thickness , from 3 to 5 inches, so as to meet a desired use or produce a particular aesthetic appearance.

As to claim 32, the limitations of claim are disclosed as described above. Friesner et al. further disclose the wall member made of a non-porous material (page 5 lines 32-35). It would have been obvious to one of ordinary skill in the art at the time of the invention to further modify the shield of Heschung as modified by Friesner et al. by making out of a non-porous material as disclosed by Friesner et al. so as to use stock materials that are readily available.

As to claims 33, Heschung as modified by Friesner et al. further disclose the slit being generally parallel (Heschung at Fig. 1).

Claim 27 is rejected under 35 U.S.C. 103(a) as being unpatentable over Heschung (FR 2356361 A) in view of Friesner et al. (WO 93/03603) in further view of Posa (US 6,115,960).

As to claim 27, the limitations of claim 24 are disclosed as described above. Not disclosed is the fastener an aperture and tab. Posa, however, discloses a plant protector with a fastener that is an aperture and tab (shown in Figs. 5E, 5F, 5G). It would have been obvious to one of ordinary skill in the art at the time of the invention to further modify the shield of Heschung as modified by Friesner et al. by using the fastener of Posa depending upon aesthetic appeal.

Claims 30 and 31 are rejected under 35 U.S.C. 103(a) as being unpatentable over Heschung (FR 2356361 A) in view of Friesner et al. (WO 93/03603) in further view of Koffler et al. (US 4,829,707).

As to claim 30, the limitations of claim 22 are disclosed and described above. Not disclosed is at least one second body configured to be received into the body and telescopically moved with respect to the body. Koffler et al. discloses a second body (20 of Figs. 4 and 5) that is configured to be received into a body of a shield (see Fig. 5) and can telescopically move. It would have been obvious to one of ordinary skill in the art at the time of the invention to further modify the shield of Heschung as modified by Friesner et al. by adding a second body as disclosed by Koffler et al. so as to have an insulating layer to keep plants warm on cold nights (see Koffler et al. col. 4 lines 1-14).

As to claim 31, Heschung as modified by Friesner et al. and Koffler et al. further disclose a retaining means for the second body (tight fit that is shown in Fig. 5 is a retaining means).

***Response to Arguments***

Applicant's arguments filed 5 Oct 2006 have been fully considered but they are not persuasive. Examiner has applied new art that discloses a shield which is self-closing and has cleats. The combination is proper because the reference are in the area of plant protectors or shields.

***Conclusion***

The prior art made of record and not relied upon is considered pertinent to applicant's disclosure. Coquerel discloses in the prior art a plant shield that telescopes and has cleats.

Applicant's amendment necessitated the new ground(s) of rejection presented in this Office action. Accordingly, **THIS ACTION IS MADE FINAL**. See MPEP § 706.07(a). Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Jeffrey L. Gellner whose telephone number is 571.272.6887. The examiner can normally be reached on Monday-Friday, 8:30-4:00, alternate.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Peter Poon can be reached on 571.272.6891. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.



Jeffrey L. Gellner  
Primary Examiner  
Art Unit 3643